IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

HERBERT A. FRIEDLICH,
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Petitioners pray the Court to grant a rehearing of the decision in the above entitled cause.

The decision here would have been astounding enough if the Court had first decided that Spiegel had unintentionally, but *certainly*, retained a possibility of reverter by operation of law, worth $100 at his death, and had then held, because of that possibility, that $1,140,000 must be added to gross estate for estate tax purposes. It is, however, incredible that the Court would subject the estate to that additional liability without first deciding—without even being certain in its own mind—that Spiegel held *any*

possibility of reverter when he died. Yet that is just what the Court has done.

In effect, the Court has said here:

> Petitioners may be taxed under section 811(c) only if the Spiegel trust set up contingent remainders. The Court would be justified in deciding that the remainders were vested and, hence, that no reverter existed. It would also be justified in holding that they were contingent. However, the Court need not determine the question of vested or contingent—the question without the answer to which the case cannot be decided—because the Court of Appeals decided that the remainders were contingent. Of course, the Court of Appeals may have erred (who knows!) but, right or wrong, $1,140,000 should be added to gross estate on account of the reverter, if any, which would have been worth less than $100 if it existed—and the Court does not decide that it existed.

Neither logic nor precedent justifies this result. This Court took the case. It has been argued twice. It has been considered by the Court for over twelve months. Before the Court subjects petitioners to payment of a fortune in additional taxes solely on account of a $100 possibility of reverter, it should, we submit, either itself decide that a reverter existed or send the case back so that an Illinois Court may decide whether or not there was a reverter.

1. Under Illinois law, the Spiegel remainders were vested and there cannot possibly be a reverter by operation of law after a vested remainder. This Court should so hold.

There is no need for argument whether, if the Spiegel trust failed, there would be a reverter. If there was a failure, a right of reverter would exist. But a failure was possible if (and only if) the remainders were contingent. The settlor of a *contingent* remainder, in reality,

retains an equitable reversion until it can be determined whether the contingency upon which the remainder can vest will occur; in a real sense, he has not given away the equitable reversion after the contingent remainder.' *Peterson* v. *Jackson*, 196 Ill. 40, 49 (1902). *Richardson* v. *Roney*, 382 Ill. 528, 537 (1943). See also, Fitch, Real Estate Titles in Illinois, pp. 61-2 (1948). If, on the other hand, the remainders were vested (and they were), the trust could not possibly fail since a trust, which provides for a vested remainder, disposes of the entire interest of the settlor and cannot fail; upon the death of a vested remainderman, the remainder passes to his heirs or legatees.[1] Absent a failure of the trust, there could be no reverter. Counsel do not disagree on this hornbook law, but there is a misapprehension in the Court's opinions.[2] The question for decision is clear cut. It is: Were the remainders vested? If so, there can be no question of failure of the trust and no

1. See Petitioners' Brief pp. 15-16, 21-23; Reply Brief 3-5. Upon the death of a *vested* remainderman, the value of his remainder is included in his gross estate for estate tax purposes under section 811(a) of the Code. See *Kinney's Estate* v. *Commissioner*, 80 F. 2d 568, 569-72 (CCA 9th, 1935); *Frazer's Estate* v. *Commissioner*, 162 F. 2d 167, 168 (CCA 3d, 1947).

2. See majority opinion p. 6: "It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor." Even if all named beneficiaries died, there would be no reverter, under state law, unless the beneficiaries held *contingent* remainders. Suppose a trust to A for the life of settlor with remainder in fee to B upon settlor's death. If B dies before settlor, B's heirs or legatees will take B's *vested* remainder. The heirs or legatees are, in effect, substituted beneficiaries and it may not be said, in any true sense, that all beneficiaries of a *vested* remainder ever die before the settlor.

See also concurring opinion (p. 14), approving language of the Court of Appeals (which referred to, and is true only of, a *contingent* remainder) to the effect that if no beneficiaries survived, the trust would fail and revert. The concurring opinion cites, among other authorities, Restatement, Trusts, § 411, and 3 Scott, Trusts, § 411, which refer to failure of trusts. The same authorities state that a *vested* remainder cannot fail. See Restatement, Trusts, § 411(*b*), and 3 Scott, Trusts, § 411.5.

possibility of reverter under Illinois law or, for that matter, American property law generally. Decide that the remainders were contingent and there was a possibility of reverter. Decide that they were vested and there was no possibility of reverter. The question to be decided is the character of the remainders; a failure of the trust and a reverter (resulting trust) were an impossibility or possibility depending upon whether the remainders were vested or contingent.

The court below decided that the remainders were contingent under Illinois law on the authority of a single *Federal* decision—*Klein* v. *United States*, 283 U. S. 231 (1931). It cited no Illinois authority on the basic vesting problem. It contented itself with a decision of this Court on a state of facts, which could hardly have been more unlike the Spiegel facts.[3] Petitioners, on the other hand, cited many Illinois decisions to the effect that remainders, similar to those at bar, were vested.[4] The Court of Appeals tossed out all petitioners' authorities on the theory (not raised in briefs or argued) that they involved wills and were inapplicable because "there can be no divesting of * * * rights except as provided in the will." Illinois law, however, is clear that *no* vested remainder (whether under will or *inter vivos* instrument) can be divested except under the exact conditions specified in the trust.[5] And rules with respect to vesting apply to remainders set up by *inter vivos* trusts as well as to those set up by wills.[6] Ironically, this Court decided that

3. See table in Petitioners' Brief p. 31.

4. See Petitioners' Brief pp. 17-20.

5. See Petitioners' Brief pp. 22-25.

6. See *Peadro* v. *Peadro*, 400 Ill. 482, 487 (1948):

"It is a well-established principle that the law favors the vesting of estates. Remainders will not be held contingent unless the intention to create such interest clearly appears from the words of the will or *other instrument*. * * * The law favors a construction which vests an absolute estate rather than a contingent or defeasible one. * * * The reason

the *Klein* remainder (created by *inter vivos* deed) was contingent on the authority of two Illinois decisions, both involving wills (*Haward* v. *Peavey*, 128 Ill. 430 and *Baley* v. *Strahan*, 314 Ill. 213) and both referred to in the portion of the *Klein* opinion, quoted by the Court of Appeals.

Except for the Illinois wills cases, contained in the quotation from the *Klein* opinion, the opinion of the court below, which purports to lay down Illinois law on vesting of remainders, cites Illinois decisions only on the following matters:

(a) In footnote 4, it listed certain of the decisions on which *petitioners* relied.

(b) It cited Illinois decisions for the proposition that "it could not be disputed that if there were no takers under the *will* at the time of the testator's death, the property would be intestate property." There is no explanation why it is necessary to cite Illinois or any other authority for that proposition; it would not be disputed by anyone.

(c) It cited an Illinois Appellate Court decision (*Lill* v. *Brant*, 6 Ill. App. 366, *reversed* 96 Ill. 608,

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for thus favoring vested rather than contingent estates and indefeasible rather than defeasible ones is to prevent the exclusion of property from the natural laws of descent and *to permit and promote the unrestricted alienation of property*, and not leave it tied up or uncertain for long periods, awaiting the happening of some contingency in the future. * * *" (Italics ours.)

See also, 3 Restatement of the Law of Property, § 243(c):

"The act of drafting and executing a will generally connotes an intention on the part of the testator to make complete disposition of his assets. Similarly the act of executing and delivering *a deed or instrument of gift* as to specific land or other specific thing generally connotes an intention on the part of the transferor to transfer his complete interest in that specific land or other thing. Consequently, the intent commonly prevalent among conveyors justifies the conclusion that, unless a contrary intent of the conveyor is found from additional language or circumstances, he intends to transfer all his assets in the case of a will, *or all his interest in the specific land or other thing, in the case of a deed or instrument of gift*." (Italics ours.)

See also, Petitioners' Brief pp. 27-29; Reply Brief pp. 7-9.

involving neither a testamentary nor an *inter vivos* trust but an escrow to pay creditors; the escrow had terminated because of full payment to the creditors and thus the remaining balance was required to be repaid to the depositor) for the proposition that, when a *contingent* remainder fails, there is a resulting trust to the settlor. We have cited respectable Illinois authorities for the same indisputable proposition.[7]

That is the Court of Appeals opinion of which the Court here says (p. 6):

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. * * * Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

That is the opinion in reliance on which over $1,140,000 is added to gross estate. Taxes are very real. If is, however, utterly unreal to decide a case solely on Illinois law, as the Court has done here, and to find that law in a single decision by an inferior federal court which, in turn, relied upon a single decision of this Court for determination of the Illinois law.

This Court will take cases on *certiorari* when a Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."[8] One of the reasons, relied upon by petitioners for allowance of the writ of *certiorari* here, was that the court below had wrongly decided that the instant remainders were contingent under Illinois law.[9] Respondent sought to limit the writ to the *Dobson* and substantiality issues and opposed the granting of the writ on the Illinois law point, citing the same authorities now cited by the Court (*MacGregor* v. *State Mutual Co.*, 315 U. S.

7. See Petitioners' Brief p. 16.
8. Supreme Court Rule 38, 5(b).
9. See Petition for Certiorari p. 6.

280, and *Helvering* v. *Stuart*, 317 U. S. 154). See Memorandum in opposition to Petition for Certiorari, pp. 8-10. The writ was, however, granted without limitation (R. 211). The Court should, therefore, decide the question of Illinois law—not rely on an opinion of a lower court which is based, not upon Illinois decisions, but upon one opinion of this Court dealing with an utterly unrelated set of facts. Although it be granted *arguendo* that, as the majority opinion says, "reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention," the Court should, nevertheless, decide the question. Regardless of how close a question of law may be, regardless of difficulties and regardless of reasonable arguments, there can be only one correct answer as to the law applicable to any given set of facts at any given time. There will be, we submit, a failure of justice if this Court relies upon a lower court's decision that Illinois law is as *this Court* stated it to be fifteen years before in a very different case.

While the Court at times relies upon the lower Federal court for local law, it is under no compulsion by statute or rule so to do. Thus, it stated, in *Helvering* v. *Stuart*, 317 U. S. 154, 164, that in certain instances "we examined the state cases to determine the applicable state law * * *. We could do the same here * * *."[10] The minority in the *Stuart* case rightly said (p. 172) "we have not wholly abdicated our function of reviewing such determinations of state law [by Courts of Appeals], merely because courts

10. See *Meredith* v. *Winter Haven*, 320 U. S. 228, 237:

"'Accepting this responsibility, * * * this Court [*not the Court of Appeals*] has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state has not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain.'"

See also, *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

of appeals have made them." Here, however, the Court says (pp. 4-5):

> "But the Tax Court's findings of fact showed that the trust contained no provision for disposition of the corpus should the settlor outlive the beneficiaries. This finding of fact, which we accept, plus the Court of Appeals determination of controlling Illinois law, *without more*, brings this trust transaction within the scope of the possession or enjoyment provision of 811(c) as we have interpreted that section in the *Hallock* and *Church* cases." (Italics ours.)

This, we submit with all deference, is abdication. The Court apparently accepts the lower court's determination of Illinois law because (p. 6):

> "It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor."

But the proposition which the Court finds reasonable, is neither the law of Illinois nor even stated by the Court of Appeals to be Illinois law. The lower court held only that (a) the Spiegel remainders were contingent (for which decision it relied, not on Illinois decisions, but the *Klein* opinion of this Court) and (b), being contingent, if there were no beneficiaries to take at the termination of the trust, the trust would fail and revert to the settlor. We conceded, in our original brief (pp. 9, 16), that, if it be erroneously assumed that the remainders were *contingent*, a reverter would have been possible. The court below, however, did not (and we are sure would not) hold that there can be a possibility of reverter after a *vested* remainder. The Illinois law question, upon which the decision of this Court must be based, is whether the instant remainders were vested or contingent. If vested, petitioners must prevail since there could then be no possibility of reverter by operation of law. If contingent, petitioners would lose on the basis of the majority's decision because

a resulting trust and reverter would, in that event, be possible. The question whether a remainder is vested or contingent does not depend on reasonableness but upon local precedents—and the only precedent upon which the Court of Appeals relied to hold the Spiegel remainders contingent was not local.

In this case, we submit that, under all the circumstances, petitioners are entitled to the decision of this Court. There is no doubt that, under Illinois law, the remainders here were vested. On September 29, 1947 (nine months after the Court of Appeals decision), Daniel M. Schuyler, Lecturer on Law at Northwestern University Law School and co-author of Carey and Schuyler on Illinois Law of Future Interests, delivered a lecture before the Chicago Bar Association on "Property Law Still Has Tax Consequences." He discussed fully the Illinois law applicable to the Spiegel remainders. He concluded with respect to the instant case[11] (Appendix p. 258):

> "Let us concede that it is of no significance that it [the Spiegel trust corpus] might return by operation of law rather than by the terms of the instrument. *The cases from Illinois, the property cases, demonstrate conclusively, I think, that the property could not return either by the terms of the instrument or by operation of law.* The only way that it could return to the settlor was by virtue of the possibility that he might at the death of all of the beneficiaries, inherit from them under the laws of intestate succession, a thing which he might do just as easily if he gave the property directly and outright to his children, and they predeceased him.

11. This lecture was published in full in 29 Chicago Bar Record 248 (July, 1948). That issue of the Chicago Bar Record is attached hereto as an Appendix so that the Court may have complete opportunity to examine it. In view of the short time within which to file this Petition for Rehearing, the lecture was not reprinted and we pray the indulgence of the Court with respect to the format of the printing and the character of the paper.

See also, 42 Illinois Law Review 561 (September-October, 1947).

> He then conceivably might be their heir or next of kin, and only to that extent could the settlor, under the Illinois cases, in the *Spiegel* case, have gotten that property back." (Italics ours.)

The Illinois authorities are clear that the state supreme court would hold the remainders vested.[12] The Illinois texts are to the same effect.[13] Even Respondent, having originally conceded that the remainders were vested,[14] ultimately argued only that, although the remainders would have been vested if created by will, the rule, favoring vesting under wills, has no application to an *inter vivos* trust. However, speedy vesting is favored under wills and living trusts both in Illinois and generally.[15]

The Court, we submit, should either:

(a) itself determine whether the remainders here are vested or contingent under Illinois law and, thus, whether Spiegel, at his death, had not or had any possibility of reverter by operation of that law; or

(b) send the case back to the Court of Appeals to be held there pending proceedings under the Illinois Declaratory Judgment Act or otherwise in Illinois courts, which would result in a determination whether the Spiegel remainders were vested or contingent (see *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 483-4 (1940); *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105-6 (1944); *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171-2 (1942); or

(c) remand the case to the Court of Appeals to determine (i) whether Illinois decisions, since the decision of

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12. See Petitioners' Brief pp. 17-20.

13. See Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, § 328.

14. See Petitioners' Reply Brief p. 5.

15. See footnote 6, pp. 4-5, *supra*.

the Court of Appeals,[16] change the opinion of the lower court (now based solely on *United States* v. *Klein*) that the Spiegel remainders were contingent, and (ii) whether, under the instant trust, a grandchild was required, in order to take, to survive both his parent and the settlor or only his parent (see footnote 1, and part I, 3, second paragraph, of Mr. Justice Frankfurter's dissenting opinion; see also, Petitioner's brief, footnote 7, p. 24).

2. Even though Spiegel retained a possibility of reverter by operation of law, he did not intend so to do and, accordingly, the transfer was not "intended" to take effect at death.

The Court has said here that (p. 3) "the taxability of a trust corpus under this provision of § 811(c) does not hinge on a settlor's motives * * *." It goes on to say that any requirement (p. 4) "such as a post-death attempt to probe the settlor's thoughts in regard to the transfer" would partially impair the effectiveness of the "possession or enjoyment" provision of the section "as an instrument to frustrate estate tax evasions." Yet, in every case of contemplation of death there must be "a post-death attempt to probe the settlor's thoughts" and the "contemplation of death" and the "possession or enjoyment" provisions are side-by-side in section 811(c). The section has a single purpose—to "frustrate estate tax evasions"—whether by gifts in contemplation of death or by transfers the effectiveness of which are intended to be postponed. See *United States* v. *Wells*, 283 U. S. 102, 116-17 (1931); *Allen* v. *Trust Company of Georgia*, 326 U. S. 630, 636 (1946).

By the "possession or enjoyment" provisions of sec-

16. *See Freudenstein* v. *Braden*, 397 Ill. 29, 35 (1947). See also *Pedro* v. *Pedro*, 400 Ill. 482, 487 (1948).

tion 811(c) Congress intended to include in gross estate those *inter vivos* gifts "which may be resorted to as a substitute for a will, in making dispositions of property operative at death." *Helvering* v. *Hallock*, 309 U. S. 106, 114 (1940). And says the concurring opinion here (p. 11): "It is impossible for me to look upon the Spiegel or Church trusts as closely akin to a will."

Therefore, even if the Spiegel remainders had been contingent and there had, therefore, been a remote possibility of reverter inadvertently retained, the transfer was, nevertheless, not taxable under § 811(c) as Spiegel did not intend to retain any interest or possibility of interest in the trust property.

3. In any event, if any possibility of reverter by operation of law did exist, its value during Spiegel's life, and his chances of benefiting from it, were so small as to be negligible and should be disregarded for tax purposes.

Substance and not form determines taxability. Thus, the Court said again, in its *Church* opinion (p. 11), "we look to substance not to form * * *." In substance, Spiegel, on any theory, retained nothing of the trust during his life and, in substance, had no possibility during his life of ever acquiring any part of the trust. His estate should, therefore, not be taxed on account of the trust.

If the interest or possibility, which the court holds Spiegel retained, were substantial, it would be difficult to conceive of circumstances which the Court could find evidenced only a formal retention. And the rule laid down here does not protect the Government. It is palpable that, in a situation such as that before the Court, a settlor has no actual interest in any reverter. Therefore, after completion of listing beneficiaries in whom he is really

interested, he need only add a final remainder to the United States of America or to a charitable corporation. Thereby, although, as a practical matter, he gives away nothing which he had not already disposed of, his estate would (using the case at bar as an example) obviate the inclusion of $1,140,000 in gross estate.

Counsel for Respondent, at the second oral argument here, argued, among other things, that *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929), should be overruled. Addressing himself to Mr. Justice Frankfurter, he explained that it was the Government's position that taxability under section 811(c) ought to depend, not upon retention of a remote possibility of reverter by operation of law, but upon termination of the trust and its distribution at the settlor's death. He stated that a million dollars of property ought not to be included in gross estate on account of a comparatively valueless and remote—a "trivial"—possibility of reverter by operation of law.[17] We agree with counsel. It is "trivial"—the quintessence of formalism—to include a million dollars in gross estate, when the settlor at death retained what was, in substance, of no value.

This is an unusual case. It was submitted for decision on October 24, 1947, and held under advisement in this Court until January 17, 1949, a period of thirteen months. It was briefed and argued twice. There is great divergence of opinion among the Justices. The majority finally determined that it would not decide the basic question in

17. Transcript (Ward & Paul) of oral argument before the Supreme Court in case at bar, October 12, 1948 (p. 48):

"Mr. Raum: He had a right to reacquire in the event that he outlived the designated beneficiaries.

"Mr. Justice Frankfurter: He could dispose of that.

"Mr. Raum: Well, that is a trivial—in many cases, a wholly trivial—

"Mr. Justice Frankfurter: That is the heart of the business that he has got some interest left of which he is the disposer.

"Mr. Raum: Well, you do not tax a million dollar estate on the basis of a trivial interest that is retained."

the case but would accept a determination of Illinois law reached by a Court of Appeals through reliance, not upon a pertinent decision of the Supreme Court of Illinois, but upon a Federal decision which is not even close to being in point on the facts. The refusal of the Court to decide the question, which it should decide, results in an unconscionable tax, augmented by interest.

This is clearly one of those exceptional cases in which the Court should grant a rehearing and we pray that the Court will so do.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that (i) he is one of the counsel for petitioners in the above entitled cause and (ii) the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

Chicago, Illinois, January 29, 1949.

HERBERT A. FRIEDLICH.